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No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND J. DONOVAN, SECRETARY OF LABOR, APPELLANT

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether, under the doctrine of intergovernmental immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the minimum wage and overtime provisions of the Fair Labor Standards Act may constitutionally be applied to the employees of a publicly owned and operated mass transit system.

PARTIES TO THE PROCEEDING

In addition to the appellee named in the caption, appellees include the American Public Transit Association and Joe G. Garcia.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The amended opinion of the district court (App. A, *infra*, 1a-20a) is reported at 557 F. Supp. 445.[1] A prior judgment order issued by the district court (App. C, *infra*, 22a-24a) that was vacated by this Court (*Donovan* v. *San Antonio Metropolitan Transit Authority*, No. 81-1728 (June 7, 1982)) is unreported.

JURISDICTION

The amended judgment of the district court (App. D, *infra*, 25a-27a) was entered on February 18, 1983, effective February 14, 1983 (see note 1, *supra*). A notice

[1] The district court issued a memorandum opinion and judgment on February 14, 1983, but it withdrew the opinion and judgment on February 18, 1983 (App. B, *infra*, 21a) and entered an amended opinion and judgment on that date. The court's February 18 order recites that the amended judgment shall "be effective as of February 14, 1983."

of appeal to this Court (App. E, *infra*, 28a-29a) was filed on March 3, 1983. On April 25, 1983, Justice White extended the time for docketing the appeal to and including June 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution, the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, and the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, are set forth in Appendix F, *infra*, 30a-36a.

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. V) 201 *et seq.*, requires covered employers to pay their employees a minimum hourly wage and to pay them at no less than one and one-half times their regular rate of pay for hours worked in excess of 40 during a work week. See 29 U.S.C. (& Supp. V) 206(a)(1) and 207(a)(1). The original version of the FLSA excluded states and their political subdivisions from the definition of an "employer" used in the minimum wage and overtime provisions; state and municipal employees were accordingly unprotected under these provisions of the Act. See 29 U.S.C. (1940 ed.) 203(d). In 1966, Congress extended the coverage of the FLSA in various respects and eliminated the previously applicable exemption as to virtually all employees of hospitals, institutions, and schools operated by the states and their subdivisions, whether operated for profit or on a nonprofit basis, that were deemed to be "[e]nterprise[s] engaged in commerce or in the production of goods for commerce." Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Section 102(a), (b), and (c), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(1),

203(s)(4).[2] The constitutionality of this "enterprise concept" of coverage and of the inclusion of publicly operated schools, hospitals, and institutions under the Act was sustained in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).[3]

In addition to schools, hospitals, and institutions, the 1966 FLSA amendments extended coverage to employees of all transit companies "engaged in commerce" that are either publicly owned or privately owned but subject to state or local regulation. Pub. L. No. 89-601, Section 102(a) and (b), 80 Stat. 831, 29 U.S.C. (1970 ed.) 203(d), 203(r)(2).[4] However, the 1966 FLSA amendments did not provide overtime pay protection to drivers, operators, and conductors ("operating employees") employed by transit companies, public or private, brought under the Act. Pub. L. No. 89-601, Section 206(c), 80 Stat. 836, 29 U.S.C. (1970 ed.) 213(b)(7). The plaintiffs in *Maryland* v. *Wirtz* did not challenge the public transit employee provisions of the 1966 FLSA amendments, and the Court had no occasion to consider their validity. See

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[2] The effect of each of these provisions and their interrelationship is explained in *Maryland* v. *Wirtz*, 392 U.S. 183, 185-187 & n.4 (1968).

[3] The Court declined to consider, however, the statutory question whether publicly owned schools, hospitals and institutions characteristically are "engaged in commerce" and are, accordingly, subject to the minimum wage and overtime provisions of the Act, leaving that question open for case by case resolution. *Maryland* v. *Wirtz*, *supra*, 392 U.S. at 200-201.

[4] In 1961, Congress had extended the FLSA to provide minimum wage (but not overtime) protection to employees of certain private mass transit operators. See Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, Sections 2(c) and 9, 75 Stat. 65, 71-74, 29 U.S.C. (1964 ed.) 203(r), 213(a)(9), 213(b)(7). In 1966, Section 203(d) was amended to bring state or local government operated transit systems within the Act's definition of "employer." Section 203(r) was amended in 1966 to make clear that transit operations, whether public or private (but publicly regulated), are "enterprise[s]" within the meaning of the FLSA and, accordingly, that employees of a transit company engaged in commerce are entitled to the protections of the Act.

269 F. Supp. 826, 827 (D. Md. 1967), aff'd, 392 U.S. 183 (1968).

In 1974, Congress again broadened the coverage of the FLSA. This time virtually all public agencies and their employees were brought within the ambit of the Act. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, Sections 6(a)(1), (4), (5)(D) and (E), and (6), 88 Stat. 58-62, 29 U.S.C. 203(d), 203(r)(3), 203(s)(5), 203(x).[5] The 1974 amendments also set forth a schedule for phasing out the special exclusion from overtime coverage for transit operating personnel established in the 1966 amendments. Pub. L. No. 93-259, Section 21(b)(1)(3), 88 Stat. 68.

The 1974 FLSA amendments were broadly challenged by the states and their political subdivisions. In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court overruled *Maryland* v. *Wirtz*, *supra*, and restricted Congress' power to extend the protections of the FLSA to public employees.[6] The Court held that the "constitutional doctrine of intergovernmental immunity" (426 U.S. at 837) bars application of the minimum wage and overtime provisions of the FLSA to "the States *qua* States" (*id.* at 847), "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (*id.* at 852).

In overruling *Maryland* v. *Wirtz*, *supra*, the Court specified that the publicly operated "schools and hospitals involved in *Wirtz* * * * each provide[] an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens." 426 U.S. at 855 (footnote omitted). The Court also listed "such areas as fire prevention, police

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[5] These provisions and their combined effect are described in *National League of Cities* v. *Usery*, 426 U.S. 833, 838-839 (1976).

[6] The plaintiffs in *National League of Cities* did not mount a specific challenge to the public transit provisions of the 1974 FLSA amendments or to the transit provisions of the 1966 FLSA amendments.

protection, sanitation, public health, and parks and recreation" as other examples of traditional state operations. *Id.* at 851, 855. However, the Court did not purport to offer "an exhaustive catalogue of [those] * * * activities * * * which are well within the area of traditional operations of state and local governments" and that accordingly may not be subject to federal commerce power legislation, where other elements of the test for immunity are satisfied. *Id.* at 851 n.16.

Although the Court thus left unsettled the status of federal legislation affecting a broad range of state governmental functions, it made clear that not all state activity is insulated from the reach of federal commerce power enactments. Indeed, the Court singled out one activity as outside the scope of the Tenth Amendment's protection: a state's "operation of a railroad engaged in 'common carriage by rail in interstate commerce * * *.'" *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 854 n.18, quoting *United States* v. *California*, 297 U.S. 175, 182 (1936). The Court commented that "California's activity [in operating a railroad] was not in an area that the States have regarded as integral parts of their governmental activities." 426 U.S. at 854 n.18.

On remand for entry of an order implementing this Court's *National League of Cities* decision, the three-judge district court concluded that this Court's decision was "limited to invalidating regulation, under the commerce clause, of the hours and wages of those state and local government employees engaged in activities integral to and traditionally provided by government." *National League of Cities* v. *Marshall*, 429 F. Supp. 703, 705 (D.D.C. 1977). Recognizing the existence of "a gray area, which will require elucidation in the factual settings presented by future cases" (*id.* at 706), and troubled by the possibility that double damages could be sought against state and local governments for FLSA violations (see 29 U.S.C. (Supp. V) 216(b) and (c)), the district court concluded that "[i]t may be appropriate to pro-

vide some protection to the state and local governments" (429 F. Supp. at 706).

In response to the district court's request, the Secretary of Labor submitted a proposal to amend his FLSA enforcement policy statement, 29 C.F.R. Part 775, so as to provide for listing of governmental activities deemed to lie outside the scope of the states' Tenth Amendment immunity from application of the FLSA. The Secretary's proposal also indicated that he would not seek double damages for violations as to any period prior to the listing of a government activity as covered by the Act. The Secretary's proposal was approved by the district court (*National League of Cities* v. *Marshall*, *supra*, 429 F. Supp. at 706) and published as an interpretative regulation. See 29 C.F.R. 775.2(b) and (d), and 775.3(b). Pursuant to the approved procedure, on December 21, 1979, the Secretary of Labor amended his statement of enforcement policy to include local mass transit systems in the category of government activities not integral to a traditional government function and hence subject to the FLSA. 29 C.F.R. 775.3(b)(3).

2. Appellee San Antonio Metropolitan Transit Authority ("SAMTA") is a regional transit authority created pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1982) to serve the San Antonio metropolitan area. SAMTA began operations on March 1, 1978, when it acquired the facilities and equipment of the city-owned San Antonio Transit System, which had begun operations in 1959.[7] Prior to 1959 public transportation in San Antonio was provided by a private transit company.

Since its establishment SAMTA has received substantial federal financial assistance, in the form of grants

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[7] The San Antonio Transit System was operated pursuant to the terms of a private revenue bondholders' indenture with a local bank (App. A, *infra*, 7a n.4).

in aid for capital improvements and operating expenses, as well as technical assistance, under the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.* ("UMT Act"). During the first two fiscal years of SAMTA operations the Authority received non-capital grants of approximately $12.5 million, or 30% of its total operating expenses.[8] SAMTA's predecessor, the San Antonio Transit System, had also received substantial federal financial aid prior to the SAMTA takeover. During the period December 1970 through February 1980, SAMTA and its predecessor received $51,689,000 in federal grants, or approximately 40% of their total eligible projects costs of $130,922,194. Of this federal assistance, $31,040,080 represented capital grants under Sections 3 and 5 of the UMT Act; $20,620,270 was operating assistance under Section 5; and $28,654 was technical assistance (research, development, and demonstration grants) under Section 6 of the UMT Act.[9]

3. On November 21, 1979, SAMTA filed a complaint seeking a declaratory judgment that its operations are integral operations of a political subdivision of the State of Texas in an area of traditional governmental functions, and accordingly are exempt, under the rule of *National League of Cities*, from both the minimum wage and overtime provisions of the FLSA.[10] The Secretary

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[8] Brief in Support of SAMTA's Motion for Summary Judgment at 10 (filed Apr. 30, 1980).

[9] Urban Mass Transportation Administration, Office of Management Information Systems, List of All Grants for the City of San Antonio, Texas (Feb. 25, 1980) (Exhibit K to Defendant's Motion for Summary Judgment).

In addition, as of 1979 SAMTA had received federal funding commitments for acquisition of 325 new buses. Urban Mass Transportation Administration, Major Funding Commitments for Buses Since Feb. 1965, as of Sept. 30, 1979 (Exhibit L to Defendant's Motion for Summary Judgment).

[10] In its complaint (at ¶¶ 4-6), filed just before the Secretary published his enforcement policy respecting mass transit (see page 6, *supra*), SAMTA alleged that the Secretary had informally con-

of Labor counterclaimed against SAMTA for enforcement of the overtime and recordkeeping provisions of the Act. 29 U.S.C. 217.[11] The American Public Transit Association, a trade association of public transit operators, intervened as a plaintiff, supporting SAMTA, while Joe G. Garcia, a SAMTA employee, intervened as a defendant, supporting the Secretary.

On November 17, 1981, the district court denied the Secretary's motion for partial summary judgment and entered judgment for SAMTA. The court issued no opinion, but its judgment stated (App. C, *infra*, 23a) that local, publicly operated mass transit systems such as SAMTA constitute integral operations in an area of traditional governmental functions for purposes of applying the rule of *National League of Cities* v. *Usery*, *supra*. The district court accordingly concluded that the Secretary may not enforce the minimum wage and overtime pay provisions of the FLSA against SAMTA and other public transit operators.

4. The Secretary and intervenor-defendant Garcia appealed to this Court pursuant to 28 U.S.C. 1252. This Court vacated the district court's judgment and remanded the case for further consideration in light of the intervening decision in *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678 (1981). *Donovan* v. *San Antonio Metropolitan Transit Authority*, Nos. 81-1728 & 81-1735 (June 7, 1982).[12]

5. Upon remand, the district court adhered to its conclusion that the minimum wage and overtime provisions

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cluded that mass transit operations were not within the sphere of intergovernmental immunity, and that employees of SAMTA had, on this basis, begun to assert a right to receive overtime compensation under the FLSA and had indicated their intention to seek remedial relief under the Act.

[11] SAMTA evidently paid its employees the minimum wage at the time in question.

[12] Justices Brennan, White, and Marshall would have noted probable jurisdiction and set the case for oral argument.

of the FLSA may not be applied to publicly owned and operated mass transit systems such as SAMTA (App. A, *infra*, 1a-20a). Although the district court acknowledged that "the historical record *is not* one of predominately [*sic*] public ownership and operation of transit services" (App. A, *infra*, 5a; emphasis in original), it concluded that mass transit "has traditionally been a state prerogative and responsibility" because private transit operations have generally been subject to state or local regulation (*id.* at 6a).

The district court recognized that under *United Transportation Union* v. *Long Island R.R.*, *supra*, the states cannot invoke Tenth Amendment immunity in circumstances where such immunity would "erode federal authority over previously private functions recently converted to public ownership" (App. A, *infra*, 6a). But the court distinguished *Long Island Rail Road* on the ground that the FLSA itself had only recently been extended to cover transit employees in the public sector (App. A, *infra*, 7a-8a). Because other federal commerce power legislation, the application of which to transit companies antedates that of the FLSA, expressly exempts public employers from coverage, the district court stated that "[n]o * * * federal authority exists to be eroded in the area of transit" (*id.* at 20a; see also 9a-10a).

Finally, the district court concluded that mass transit cannot satisfactorily be distinguished from fire prevention, police protection and other public services classified as traditional state functions in *National League of Cities* (App. A, *infra*, 11a-17a). The court thus rejected (*id.* at 13a-17a) the holding of *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), cert. denied, No. 82-701 (Jan. 17, 1983), that the critical role played by federal grant funds in stimulating and underwriting the conversion of transit systems to public ownership differentiates the emerging public role in transit operation from traditional state functions for purposes of delineating the scope of state immunity under the FLSA.

THE QUESTION IS SUBSTANTIAL

This case presents an important question concerning the authority of Congress to require maintenance of reasonable conditions of employment for a substantial class of working men and women employed by enterprises in interstate commerce. The decision of the district court that the protections of the Fair Labor Standards Act may not constitutionally be extended to the employees of publicly owned mass transit systems is contrary to the limiting principle, recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), that confines the doctrine of intergovernmental immunity to traditional governmental functions. The district court's decision also disregards this Court's admonition that, in order to establish immunity from federal legislation under the doctrine of *National League of Cities*, a state employer must demonstrate that the legislation "affects basic state prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 686-687 (1982), quoting *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851. Moreover, the district court's decision is contrary to three decisions by the courts of appeals on the precise question presented. See *Alewine* v. *City Council*, 699 F.2d 1060 (11th Cir. 1983); *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (6th Cir. 1983); *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), cert. denied, No. 82-701 (Jan. 17, 1983).[13]

As the courts of appeals have recognized, significant features of the local transit industry and the record of local government participation therein set public transit apart from those "core state functions" (*EEOC* v. *Wyo-*

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[13] The district court's ruling is also contrary to *Scholz* v. *City of LaCrosse*, No. 80-C-238 (W.D. Wis. Sept. 1, 1982), appeal pending, No. 82-2890 (7th Cir.); and *Francis* v. *City of Tallahassee*, 424 So. 2d 61 (Fla. App. 1982).

ming, No. 81-554 (Mar. 2, 1983), slip op. 9) that are generally immune from federal commerce power regulation. First, as the district court acknowledged (App. A, *infra*, 5a; emphasis in original; footnote omitted): "[t]he historical record *is not* one of predominately [*sic*] public ownership and operation of transit services." Second, although there has been a marked shift toward public sector operation of mass transit in recent years, that shift was greatly assisted and accelerated by the availability of substantial federal grants under the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.* Finally, in entering the field of mass transportation, the states and their subdivisions have chosen to participate in a form of commerce already subject to federal legislation governing significant aspects of the employment relation. Each of these factors serves to distinguish this case from *National League of Cities* itself.

For the foregoing reasons, and because the district court's decision holding the Fair Labor Standards Act unconstitutional as applied to public transit employment will deprive a subtantial number of employees of the protections Congress has established, review by this Court is warranted.

1.a. In *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 852 (emphasis added), this Court held that the 1974 amendments to the FLSA that extend minimum wage and overtime protection to virtually all public employees are unconstitutional "insofar as [they] operate to directly displace the States' freedom to structure integral operations in areas of *traditional* governmental functions."[14] As indicated above (pages 4-5), the Court did

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[14] The Court repeatedly characterized as "traditional" the state activities upon which the federal legislation was deemed impermissibly to intrude. See, *e.g.*, 426 U.S. at 849 "[t]he degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty * * *"), 851 & n.16 ("activities * * * within the area of traditional operations of state and local governments" and "services which the States have traditionally afforded their * * * citizens"), 855 ("those governmental services which the

not purport to provide an "exhaustive catalogue" of local governmental activities that fall within the protected sphere.

In *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the Court recapitulated the holding of *National League of Cities*, stating (*id.* at 287-288; footnote omitted; emphasis in original):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.* at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.* at 852.[15]

Most recently, the Court has emphasized that "[t]he principle of immunity articulated in *National League of Cities*" does not create "a sacred province of state autonomy" but instead is a "functional doctrine" tailored to "ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence,' [*National League of Cities* v. *Usery*, *supra*, 426 U.S.] at 845 (quoting *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)), not be lost through undue federal interference in certain core state functions." *EEOC* v. *Wyoming*, *supra*, slip op. 8-9.

States and their political subdivisions have traditionally afforded their citizens").

[15] Even where these three requirements are met, a Tenth Amendment challenge to legislation under the Commerce Clause may still fail, because "[t]here are situations in which the nature of the federal interest advanced may be such that it justifies State submission." 452 U.S. at 288 n.29. See also *United Transportation Union* v. *Long Island R.R.*, *supra*, 455 U.S. at 684 n.9.

b. Contrary to the view of the district court (App. A, *infra*, 6a, 11a-17a), provision of mass transit services is distinguishable in critical respects from "core state functions" such as public education, safety, health, sanitation, parks, schools and hospitals. First, mass transit is not a traditional local government function. As the district court acknowledged (*id.* at 5a; emphasis in original; footnote omitted): "The historical record *is not* one of predominately [*sic*] public ownership and operation of transit services." Until the 1960's mass transit had been predominantly part of the private sector. At the time of World War II, only 20 street railways and bus systems, carrying 7% of the nation's transit riders, were in public ownership. American Public Transit Association, *Transit Fact Book 1981*, at 27.[16] In 1960, only 64 of the 1251 transit systems extant were publicly owned. *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency*, 88th Cong., 1st Sess. 27 (1963) (testimony of Robert Weaver). Mass transit then was still a private enterprise in many of our nation's largest cities, including Atlanta, Baltimore, Buffalo, Cincinnati, Dallas, Denver, Houston, Milwaukee, Minneapolis, New Orleans, Pittsburgh, St. Louis, San Diego and Washington, D.C. *Id.* at 313 (testimony of George W. Anderson, Executive Vice President, American Transit Association).

To be sure, subsequent to the enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V)

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[16] The 1978-1979 edition of the same reference cites the figure of 35 systems in public ownership, but does not vary the percentage of riders carried. *Transit Fact Book* 55. We note with interest that APTA, without material revision in the underlying historical data, has revised its assessment of these facts. The earlier edition of the *Transit Fact Book* concludes that "[p]ublic ownership of transit is a recent development" (*ibid.*). The 1981 edition reverses that judgment, stating: "Public ownership of transit is not a recent development." *Transit Fact Book 1981*, *supra*, at 27.

1601 *et seq.*, which made substantial federal funds available to local governments for mass transit (see pages 6-7, *supra*, and pages 18-21, *infra*), the trend toward public ownership of transit substantially accelerated. By 1967 over 50% of all transit riders patronized publicly owned systems. *Transit Fact Book 1981*, *supra*, at 27. The latest available information is that slightly over half the operating systems, carrying over 94% of the riders, are now publicly owned.[17] However, many of the cities that have acquired transit systems have contracted out responsibility for operation of these systems to private transit management companies, which are in some cases the very companies that previously owned the systems. Of the 350 publicly owned systems in urbanized areas, more than 120 (including some of the larger systems) are privately managed.[18]

As these statistics indicate, mass transit cannot be deemed "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 855 (footnote omitted)).[19] Nor does the recent trend toward public owner-

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[17] As late as 1981, 336 of the nation's 686 urban mass transit systems and 91 of 339 systems in rural areas were still privately owned. U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas Over 50,000 Population* 19 (Aug. 1981); U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service* 13 (Feb. 1981).

[18] U.S. Dep't of Transportation, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service in Urbanized Areas over 50,000 Population*, *supra*, at 19.

[19] Indeed, part of the justification for singling out public transit workers for FLSA coverage in 1966, at a time when public employees generally were not within the Act's protection (see pages 2-3 & n.4, *supra*), was to eliminate the competitive advantage that public transit systems had enjoyed over private systems since the latter had been covered by the Act in 1961. See S. Rep. No. 1487, 89th Cong., 2d Sess. 8 (1966).

ship of local transit services justify extension of state immunity under the FLSA to these services. In *United Transportation Union* v. *Long Island R.R.*, *supra*, the Court held that application of the Railway Labor Act to govern labor relations of a state-owned commuter railroad does not trench impermissibly upon state sovereignty. The Court acknowledged that "some passenger railroads have come under state control in recent years" but emphasized that "that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments." 455 U.S. at 686 (emphasis in original). The Court accordingly concluded (*ibid.*):

> Federal regulation of state-owned railroads simply does not impair a state's ability to function as a state.

That conclusion is equally applicable to local public transit systems.

c. The district court acknowledged that mass transit service has traditionally been operated by private enterprise rather than local government. The court reasoned, however, that other transportation activities such as road-building were historically carried out by states (App. A, *infra*, 4a) and suggested that "[m]ass transit is an integral component of a state's transportation system" (*id.* at 5a). But the same could equally have been said of the commuter railroad in *Long Island Rail Road*. Plainly, *National League of Cities* does not require that all forms of transportation be treated as a single service in determining whether application of the wage requirements of the FLSA to public transit operations impairs a state's sovereignty.

The district court's alternative rationale was that historic state *regulation* of local transit service suffices to render mass transit "traditionally * * * a state prerogative and responsibility" (App. A, *infra*, 6a). The court declared (*ibid.*):

> That states chose to leave ownership and operation in private hands and to effect their interest through regulation does not negate the inference of sovereignty that arises from history.

This reasoning, which fundamentally misconceives the premise of *National League of Cities*, cannot be reconciled with this Court's decisions. Congress' authority to override state regulation by exercise of its commerce power is well established and is not limited by considerations of state sovereignty. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*, 452 U.S. at 289-292. Thus, preemption of state regulatory authority by enactment of the FLSA amendments of 1961, 1966 and 1974 did not run afoul of the Tenth Amendment. Cf. *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 397-398 (1951). A history of state *regulation* of private transit enterprise simply cannot be regarded as the equivalent of state *operation* of transit services for this purpose and provides no predicate for treating transit services recently taken over by a public entity as a traditional and essential element of state sovereignty. Cf. *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436-437 (1980) ("The basic distinction drawn in [*Hughes* v.] *Alexandria Scrap* [*Corp.*, 426 U.S. 794 (1976)] between States as market participants and States as market regulators makes good sense and sound law"); *White* v. *Massachusetts Council of Construction Employers, Inc.*, No. 81-1003 (Feb. 28, 1983), slip op. 3.[20] Indeed, the states' fundamental policy choice

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[20] In *Jefferson County Pharmaceutical Ass'n, Inc.* v. *Abbott Laboratories*, No. 81-827 (Feb. 23, 1983), the Court observed that "[t]he retail sale of pharmaceutical drugs is not 'indisputably' an attribute of state sovereignty," and declared that such state proprietary activities are subject to federal Commerce Clause legislation. Slip op. 3 n.6, quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, supra*, 452 U.S. at 288. Yet regulation of retail drug sales by private pharmacists (to the extent not preempted by federal law) is assuredly a traditional police power function. See *Whalen* v. *Roe*, 429 U.S. 589, 596-598 (1977). Plainly, the Court did not regard such regulation and direct market partici-

to pursue their objectives through regulation of nongovernment transit providers rather than direct market participation eloquently testifies that, since the inception of the industry, operation of local transit has "not [been] an area that the States have regarded as integral parts of their governmental activities" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 854 n.18).[21]

d. The district court's decision is also inconsistent with *Helvering* v. *Powers*, 293 U.S. 214 (1934). There this Court held that the Board of Trustees of the Boston Elevated Railway Company, a quasi-public street railway enterprise, could not share in the intergovernmental tax immunity of the State of Massachusetts (*id.* at 227):

> [T]he State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State. * * * [These circumstances] cannot be said to furnish a ground for immunity.

The Court's reasoning in *Powers* is fully applicable here.[22]

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pation by the state as interchangeable for purposes of Tenth Amendment analysis.

[21] Contrary to the district court's suggestion (App. A, *infra*, 6a), states are not free "to select the most suitable means to accomplish their goals in areas of unique and special concern to them." A similar argument was presented, without success, in *Long Island Rail Road*, 80-1925 Resp. Br. 11, 13-14, 27-28. And *EEOC* v. *Wyoming* expressly rejects the contention that *National League of Cities* artificially delimits a "sacred province of state autonomy." Slip op. 9.

[22] In *National League of Cities*, the Court rejected the contention that " 'the activities in which the states have traditionally engaged,' " which had been held to mark the " 'boundary of the restriction upon the federal taxing power,' " do not supply a like " 'limitation upon the plenary power to regulate commerce.' " 426 U.S. at 854, quoting *United States* v. *California*, 297 U.S. 175, 185 (1936). But nothing in *National League of Cities* suggests that Congress'

2. In *Long Island Rail Road*, the Court stated that historical evidence is of paramount importance in the fundamental inquiry as to which state functions are "traditional" for purposes of Tenth Amendment immunity. 455 U.S. at 686-687. The historical evidence recounted above (pages 13-14), and the Court's holding in *Long Island Rail Road*, provide a clear answer to this inquiry in the case of mass transit. But even if these factors were not dispositive, the circumstances under which the recent growth of public ownership of local transit systems occurred confirms that application of the FLSA to public transit employment does not intrude impermissibly upon functions that are essential to the separate and independent existence of the states.

a. The recent conversion of transit systems from private to public ownership was by no means a local phenomenon. Rather, that shift was spurred by enactment of the Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, which made available substantial federal financing for public acquisition of private systems and construction of new systems and facilities. By 1964 Congress had recognized the "deterioration or inadequate provision of urban transportation facilities and services" (49 U.S.C. 1601(a)(2)) and had concluded that "[m]ass transportation needs have outstripped the present resources of the cities and States, and [that] a nationwide program can substantially assist in solving transportation problems." H.R. Rep. No. 204, 88th Cong., 1st Sess. 4 (1963). See also *Jackson Transit Authority* v. *Local 1285, Amalgamated Transit Union*, No. 81-411 (June 7, 1982), slip op. 1-2. The UMT Act established a framework "to provide assistance to State and local governments and their instrumentalities in financing [mass transit] systems, to be operated by public or private mass transportation companies as determined by lo-

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power to regulate commerce is *more* limited than the power to tax state activities. See 426 U.S. at 843-844 n.14.

cal needs." 49 U.S.C. 1601(b)(3). Under the provisions the UMT Act, local government bodies with transit responsibilities are eligible to receive federal grants defraying as much as 80% of their capital outlays, including the costs of acquiring local private systems and making capital improvements in them, and up to 50% of their operating deficits. 49 U.S.C. (& Supp. V) 1603(a), 1604(e). By 1978 more than $13 billion in federal aid to transit had been awarded under the UMT Act and other federal programs. *Transit Fact Book, supra*, at 57. As indicated above (pages 6-7), both SAMTA and its predecessor, the San Antonio Transit System, were beneficiaries of substantial federal financial assistance.

The enactment of the UMT Act heralded the substantial expansion of the state and local governmental role in providing urban transit described above (pages 13-14). Although it is impossible to state with assurance what would have happened had federal funding not been made available, there is reason to believe that many cities would not have entered the transit business; certainly they had not generally undertaken to perform that service before the advent of federal financing.[23] See, *e.g.*, *Alewine* v. *City Council, supra*, 699 F.2d at 1063 ("Augusta stipulated that had it not been for the federal grant, it would not have purchased the assets of the Augusta Coach Company").

Thus, the transfer of responsibility for providing local transit service established not a new integral aspect of state or local government, but a classic venture in "cooperative federalism" in which the states and their subdivisions are free, but are not compelled, to join. See *FERC* v. *Mississippi*, No. 80-1749 (June 1, 1982), slip op. 21-24; *Hodel* v. *Virginia Surface Mining & Reclama-*

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[23] As of September 1976, some 115 cities had used UMT Act funds to acquire local private bus systems. F. Siskind and E. Stromsdorfer, *The Economic Cost Impact of the Labor Protection Provisions of the Urban Mass Transportation Act of 1964*, at 9-11 (May 1978).

tion Ass'n, supra, 452 U.S. at 289; *Bonnette* v. *California Health & Welfare Agency*, Nos. 81-4565 & 82-4174 (9th Cir. May 5, 1983), slip op. 15-16; *In re Glidden*, 653 F.2d 85, 88 (2d Cir. 1981), cert. denied, 454 U.S. 1143 (1982).[24] Given the critical role played by the federal government in the development of the national public transit industry, it can hardly be claimed that, although nontraditional, operation of mass transit by the states and localities has become essential to the states' separate and independent existence. As the Sixth Circuit has remarked: "It would indeed be peculiar to hold that federal aid for transit created a situation where a state which provides transit service is immune from federal labor regulations."

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[24] The federal role in mass transit was not limited to incentives for the substitution of public agencies for private companies, or for the modernization of existing systems. Prior to the enactment of the UMT Act, "[a]s suburban development increased, the tendency was for each community to maintain its political and fiscal individuality and shun comprehensive urban transportation planning." American Public Works Association, *History of Public Works in the United States 1776-1976*, at 178 (1976). The UMT Act, however, was intended to "encourage the planning and establishment of *areawide* urban mass transportation systems." 49 U.S.C. 1601(b)(2) (emphasis added). Congress made funding available for a project only if it was designed as part of a comprehensive area-wide plan, meeting federal criteria for improved transportation, and provided that grants could only be made to public agencies that have the legal and financial authority to carry out such projects. See 49 U.S.C. (Supp. V) 1602(a)(2)(A), 1604(b), 1604(g), 1607; H.R. Rep. No. 204, *supra*, at 14. By means of these requirements, local governments were induced, in many instances for the first time, to band together and to create metropolitan transit systems spanning the entire urban area. For example, appellee SAMTA was created in 1978 to serve Bexar County, Texas, pursuant to Tex. Rev. Civ. Stat. Ann. art. 1118x (Vernon Cum. Supp. 1982), which authorized creation of metropolitan area-wide transit authorities. Article 1118x was first enacted in 1973.

We note that a significant number of area-wide transit systems operate across state lines. See 49 U.S.C. 1601(a)(1); H.R. Rep. No. 204, *supra*, at 5. Such systems can scarcely be considered outside the scope of federal commerce power legislation.

Dove v. *Chattanooga Area Regional Transportation Authority*, *supra*, 701 F.2d at 53.

b. The district court concluded that federal funding is irrelevant to the question of intergovernmental immunity (App. A, *infra*, 13a-16a). The court below reasoned that: (1) federal subsidies are an exercise of Congress' Spending Power rather than its Commerce Clause authority, (2) federal monies support many of the functions treated as core aspects of sovereignty in *National League of Cities*, and (3) federal funding, especially because it is variable, cannot measure the extent of a state's Tenth Amendment immunity. It is immaterial, however, that federal funding for mass transit does not itself rest upon Congress' Commerce Clause authority. Federal funding is pertinent in this case not because it supplies the constitutional basis for imposing conditions directly upon the states, but because involvement of the federal government in the growth of public transit is a historical fact that indicates that public transit has not become an essential aspect of the states "*separate* and *independent* existence" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 851; emphasis added).

Moreover, the role played by federal funding and other requirements of federal law in the public transit industry (see page 20 note 24, *supra*) is quite different from that of federal subsidies supporting traditional local government functions. To be sure, federal monies are available for certain education, public safety, and public health activities undertaken by the states. But the federal share of total local expenditures in these areas is generally less significant than the federal share of expenditures in public transit, particularly in respect to capital costs. And, as noted above, more important than the level of federal assistance is the special role of that assistance as catalyst in the transformation of mass transit from the private sector to the public sector in many localities. There is no similar pattern of transformation of the activities treated as traditional government functions in *National League*

of Cities. On the contrary, those services were provided by virtually every municipality long before federal assistance became available.

c. The recent growth of public ownership in the mass transit industry serves to differentiate public transit from the governmental activities addressed in *National League of Cities* in yet another respect. The states and their subdivisions entered the fields of police and fire protection, public health and sanitation services, hospitals and schools long before the enactment of federal legislation governing terms of employment. And for more than 30 years after the FLSA was enacted Congress recognized the prerogatives of the states in these spheres. The vice of the 1974 amendments to the FLSA thus was the abrupt federal intrusion affecting the entire range of settled patterns of local and state government administration. See 426 U.S. at 845-852; *EEOC* v. *Wyoming*, *supra*, slip op. 12-13.

In contrast, employment relationships in the private transit industry had long been the subject of federal regulatory legislation under the Commerce Clause when, in the 1960's, local governments began in large numbers to acquire transit systems. The nation's basic labor-management relations statute, the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, enacted in 1935, applies to the private transit industry just as it does to other industries affecting commerce. See *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383 (1951); *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963).[25] Moreover, as Congress expanded the scope of national labor legislation, it applied a broad range of federal laws to the private transit

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[25] In *Bus Employees* v. *Wisconsin Board*, *supra*, 340 U.S. at 397-398, the Court rejected the claim that the substantial local interest in the affairs of a private bus company, operated as a public utility under state regulation, precluded application of the NLRA to a labor dispute between the utility and its employees, explaining that "these questions are for legislative determination" (*id.* at 397).

industry, including the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.* (reporting requirements); the Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, Section 2(c), 75 Stat. 65-66, 29 U.S.C. (1964 ed.) 203(r) and (s)(2), (minimum wage and child labor standards); the Equal Pay Act of 1963, 29 U.S.C. 206(d) (equal pay for women for equal work); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (prohibition against employment discrimination on the basis of race, sex, creed, or national origin); and the Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Sections 102(a), 206(c), 80 Stat. 831, 836, 29 U.S.C. (1970 ed.) 203(r)(2), 213(b)(7) (minimum wage; overtime pay for non-operating employees). These statutes reached the majority of all transit systems, 90% of which were, in 1967, still privately owned. *Transit Fact Book*, *supra*, at 38. Thus, when they acquired private transit companies, state and local governments entered an industry in which employment relations were subject to established federal legislation.

Because of this significant federal regulatory presence, by deciding to operate a mass transit system a municipality "subjects itself to that regulation." *Parden* v. *Terminal Ry.*, 377 U.S. 184, 196 (1964); *New York* v. *United States*, 326 U.S. 572, 582 (1946) (opinion of Frankfurter, J.). This principle was recently reaffirmed in *Long Island Rail Road*. Citing the history of federal regulation of the private rail industry, the Court declared (455 U.S. at 687):

> [T]here is no justification for a rule which would allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in areas traditionally subject to federal statutory regulation.

See also *Kramer* v. *New Castle Area Transit Authority*, *supra* (677 F.2d at 310) ("since it is undisputed that

the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area"); *Dove* v. *Chattanooga Area Regional Transportation Authority*, 701 F.2d at 53.

The district court concluded, however, that exemption of public transit employment from the requirements of the FLSA would not entail the kind of erosion of federal authority condemned in *Long Island Rail Road* (App. A, *infra*, 6a-11a). The court noted that the FLSA was not applied to private transit until 1961 or to public transit until 1966 and did not extend full protection to transit employees until 1974. But while Congress did not fully exercise its power to legislate respecting terms of employment in the transit industry until relatively recently, there can be no doubt that the constitutional authority to do so has long been available. If the states' acquisition of private transit operations extends intergovernmental immunity thereto, it necessarily involves an erosion of federal constitutional authority. In any event, the fact is that the FLSA *was* made applicable to the private transit industry in 1961 (and, indeed, to public transit in 1966) —before the bulk of the recent conversions to public ownership took place (see pages 3 & n.4 and 13-14, *supra*).[26]

The Court in *Long Island Rail Road* did observe that railroads had long been subject to federal regulatory leg-

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[26] The fact that the overtime provisions of the FLSA were not applied to the transit industry until 1974 does not alter the analysis. Congress had plainly entered the field of wage regulation in the transit industry with the 1961 and 1966 FLSA amendments. The requirement for overtime pay is not regulation fundamentally different from that previously in place. Constitutional immunity may not be founded upon Congress' decision to regulate one aspect of wages in a given industry but not another. Cf. *EEOC* v. *Wyoming*, *supra*, slip op. 15 n.17.

islation, 455 U.S. at 687-688, but there was no suggestion that such longstanding regulation was necessary to the holding that the State of New York could not extend its immunity to a commuter railroad merely by acquiring the railroad. Although the specific federal legislation at issue here is of comparatively recent vintage, it does not follow that the freedom from such regulation of state activities of roughly contemporaneous (or still more recent) vintage is essential to the separate and independent existence of the states. Because of the Supremacy Clause, the interests of the states and those of the federal government do not stand on a par in this area. Rather, within the broad limits of Congress' power to regulate commerce, federal legislation applies to the states to the extent deemed appropriate by Congress unless it is determined, pursuant to the criteria this Court has announced, that such application entails undue interference in core state functions.

In any event, if it were necessary to show that federal regulation of employment in the transit industry was established long before the recent trend toward public operation of mass transit, the longstanding application of the National Labor Relations Act to the transit industry supplies the necessary predicate. Indeed, in *Long Island Rail Road* the Court's recitation of the long history of federal railroad legislation was concerned primarily with regulatory schemes other than the Railway Labor Act (RLA), the statute directly in issue there. See 455 U.S. at 687-688. Like the railroad industry, local transit has long been the subject of significant federal statutory regulation.[27] Accordingly, to hold that the FLSA, which ex-

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[27] The district court suggested (App. A, *infra*, 9a, 10a) that statutes such as the NLRA are irrelevant here because Congress itself exempted local government employers from their reach. But the issue is not, as the district court thought (*id.* at 9a), whether "any diminution of federal authority under the NLRA that results from a private to public conversion is * * * consistent with congressional intent." Rather, the NLRA is instructive because it evidences that

pressly covers public transit employment, impermissibly interferes with state sovereignty is to sanction "ero[sion] of federal authority in [an] area[] traditionally subject to federal statutory regulation" (*United Transportation Union* v. *Long Island R.R.*, *supra*, 455 U.S. at 687).[28]

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the transit industry has "traditionally [been] subject to federal statutory regulation" (*United Transportation Union* v. *Long Island R.R.*, *supra*, 455 U.S. at 687). In examining the succession of federal statutes that historically governed commerce by rail, the Court in *Long Island Rail Road* did not pause to inquire whether particular statutes were applicable to publicly operated railroads. The relevance of these statutes was not that they established long-standing regulation of publicly owned railroads; it was sufficient that they established regulation of the heavily private railroad industry. Against this background of federal regulation of the railroad industry, the Court concluded that the RLA, which expressly covers state owned commuter railroads (see 455 U.S. at 682 n.4), does not intrude impermissibly upon matters of state sovereignty. A similar analysis is applicable here. Although Congress has not chosen to apply the NLRA to publicly owned transit systems, Congress has, through the NLRA and other statutes, established extensive federal regulation of labor relations in the transit industry.

[28] Like the district court, our analysis proceeds in terms of the history and role of public operation of transit service generally, rather than upon the specific history of SAMTA. As the Court explained in *EEOC* v. *Wyoming*, *supra*, slip op. 13, the scope of intergovernmental immunity does not depend upon the special facts of particular cases "which may vary from State to State and time to time, but on a more generalized inquiry, essentially legal rather than factual." See also *Helvering* v. *Powers*, *supra*, 293 U.S. at 227. The issue requires a uniform nationwide rule based upon national patterns. See *Alewine* v. *City Council*, *supra*, 699 F.2d at 1068-1069; *Kramer* v. *New Castle Area Transit Authority*, *supra*, 677 F.2d at 309-310.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1983

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,
PLAINTIFF-INTERVENOR

vs.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY OF LABOR OF THE UNITED STATES,
DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

MEMORANDUM OPINION

At issue in this case is whether operation of a local transit authority by the San Antonio Metropolitan Transit Authority (SAMTA), a political subdivision of the State of Texas, is a "traditional" governmental function entitled to the Tenth Amendment immunity recognized in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

On November 17, 1981, this Court granted Summary Judgment for SAMTA, finding that it performed a traditional state function that met all the requirements for Tenth Amendment immunity from the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.* A direct appeal to the Supreme Court pursuant to 28 U.S.C. § 1252 followed. The Supreme Court remanded the case for reconsideration in light of its intervening holding in *United Transportation Union* v. *Long Island Railroad Co.*, 455 U.S. ——, 102 S.Ct. 1349 (1982) (hereinafter *LIRR*). 457 U.S. ——, 102 S.Ct. 2897 (1982).

Upon further consideration, this Court finds nothing in *LIRR* that compels a change in its previous conclusion that operation of a public transit system is a governmental function entitled to Tenth Amendment immunity. When the factors considered by the Supreme Court in *LIRR* are applied to public transit, they indicate that it is once again appropriate to grant Summary Judgment for the Plaintiff and Plaintiff-Intervenor.

In *Usery*, the Supreme Court cut short the long reach of Congress' Commerce Clause power when it held that the Tenth Amendment prohibits the use of Commerce Clause power "to force directly upon the States its (Congress') choice as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855. The distinguishing characteristic entitling a state function to Tenth Amendment protection from federal regulations has been described variously as "integral", "essential", "basic", and "traditional". Despite the abundance of adjectives, identifying which particular state functions are immune remains difficult. Until

LIRR the Supreme Court had not supplied guidelines for the application of its constitutional rule. Even after *LIRR*, the Court's own efforts at identifying a sovereign state function have been marked by disagreement. *See, Federal Energy Regulatory Commission* v. *Mississippi*, —— U.S. ——, 102 S.Ct. 2126, 2141 n.30 (1982).

Like *LIRR*, this case deals with the third part of the analysis used in *Hodel* v. *Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 101 S.Ct. 2352 (1981): whether the states' compliance with federal law directly impairs their ability to structure integral operations in areas of traditional functions. *Usery* has already decided that structuring wages is an integral operation. The only question is, therefore, whether public transit is one of "the *numerous* line and support activities which are well within the area of traditional operations of state and local governments." *Usery*, 426 U.S. at 851 n.16 (emphasis added)

LIRR indicates at least three factors must be considered. First, historical reality is important. A long record of state activity in an area is one indication that a function is one of the essential types of activities that states have the primary responsibility for performing and must be free to perform if they are to meet their responsibilities to their citizens.

The focus on historical reality was not, however, intended "to impose a static historical view of state functions". 102 S.Ct. at 1354. Therefore, any other factors that, like historical reality, indicate that a function is presently a basic state prerogative, interference with which would impede the states' ability to fulfill their role in the federalist system, should also be considered. Analogy to the non-exclusive list

of traditional functions set out in *Usery* and analysis under the four-part test developed in *Amersbach* v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979) are both useful for this purpose.

Finally, in the special case of recent conversion of a private sector function to public ownership and operation, the history and scope of federal regulation must be considered to determine whether the conversion has the prohibited effect of eroding longstanding federal authority.

I. Historical Reality

Overseeing, maintaining, and regulating local and regional transportation systems historically has been a state responsibility. *Peel* v. *Florida Department of Transportation*, 600 F.2d 1070, 1083 (5th Cir. 1979). These functions are matters of a "peculiarly local nature", and the states' exercise of their prerogatives in this field has been given great deference. *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 523-24 (1959) (State highway regulations carry a strong presumption of validity.) *See also, Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841, 845-46 (1st Cir. 1982) (State agency that oversees roads and plans to build a mass transit system performs governmental activities traditional "from time immemorial".); *Amersbach*, 598 F.2d at 1037 ("Airports are indispensable" to "a principal mode of passenger transportation" and are therefore "traditional-integral governmental functions."); *United States* v. *Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978) (Licensing of drivers is an integral state function.); *United States* v. *State Road Department of Florida*, 255 F.2d 516, 518 (5th Cir. 1958) (Building and maintenance of a system of state roads is essentially a governmental function.)

Mass transit is an integral component of a state's transportation system. It has been treated as such from the time of the earliest transportation regulation in Texas up until the present day.[1]

The historical reality of mass transit reveals a long record of state concern and activity in the field. The historical record *is not* one of predominately public ownership and operation of transit services.[2] *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308, 309 (3rd Cir. 1982), *cert. denied*, —— U.S. ——, 51 U.S.L.W. 3527 (January 17, 1983). Instead of owning and operating these services, states chose to manifest their interest through regulation of fares, routes, schedules, franchising, and safety. For example, a 1913 Texas statute gave cities the authority to regulate fares and operations of vehicles used to provide carriage for hire. *See*, fn.1, *supra*, A 1915 City of San Antonio ordinance established franchising, insurance, and safety regulations for all passenger vehicles operated for hire. Ordinance OF1-1 (March 8, 1915). The City continued regulation through ordinances up until 1959,

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[1] A 1913 state statute delegated to cities exclusive control over their streets and highways, including the power to regulate, license and fix fares for vehicles used to provide carriage for hire. 1913 Tex. Gen. Law, ch. 147, § 4, at 314, *as codified*, TEX. REV. CIV. STAT. ANN. art. 1175, §§ 20, 21 (Vernon 1963). A 1975 statute establishing a system of state funding for mass transit contained a policy declaration that "public transportation is an essential component of the state's transportation system." TEX. REV. CIV. STAT. ANN. art. 6663c, § 1(a)(2) (Vernon 1977).

[2] Public ownership and operation was not, however, unusual or unique. Some of the larger metropolitan areas in the country had publicly owned and operated systems as early as the beginning of this century. *Kramer*, 677 F.2d at 309.

when the first steps in the transformation of the system from private to public hands were taken.

This record of state regulatory activity indicates that mass transit has traditionally been a state prerogative and responsibility, not a federal concern. That states chose to leave ownership and operation in private hands and to effect their interest through regulation does not negate the inference of sovereignty that arises from history. *Usery* sought to guarantee states the freedom to select the most suitable means to accomplish their goals in areas of unique and special concern to them. States would be victims of a strange irony if they are to be told that they are free to make their own decisions, but that they made the wrong choice and, therefore, decisions that otherwise meet the requirements for Tenth Amendment immunity [3] will be displaced by federal regulations.

II. Recent Conversion and Prior Federal Regulation

Notwithstanding indications of Tenth Amendment immunity arising from a review of history, *LIRR* precludes Tenth Amendment immunity when it would erode federal authority over previously private functions recently converted to public ownership. 102

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[3] While the states' decision to regulate rather than own and operate a function should not control the determination of whether a function is one traditionally associated with the states, the decision may deprive the states of Tenth Amendment immunity for other reasons. *See, Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 101 S.Ct. 2352, 2364-69, (1981) where federal regulation of strip mining was found not to infringe on Tenth Amendment guarantees because the regulation did not regulate states as states, which is one of the requirements for Tenth Amendment immunity.

S.Ct. at 1355. The recent history of both mass transit in general and of SAMTA in particular[4] includes such a conversion. *Kramer*, 677 F.2d 309. Unlike the railroad in *LIRR*, however, neither labor relations nor other aspects of mass transit have been the subject of federal regulation that will be eroded by recognizing a Tenth Amendment immunity.

In *LIRR*, the federal statute under attack was the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.* The Court found the act to be the most recent in a long history of federal railway labor relations statutes going back to 1888. 102 S.Ct. at 1355.

In this case, the federal statute under attack is the FLSA. Unlike the RLA, the FLSA is not a current manifestation of a traditional federal concern for labor relations in the mass transit field. Transit was specifically exempted from coverage from the time of the Act's original passage in 1938 until 1961 amendments subjected private transit operators to minimum wage provisions (but not the overtime pay provisions). Pub. L. No. 75-78, § 13(a)(9), 52 Stat.

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[4] Bus service in San Antonio was provided by a private company until 1959, when the city purchased the private system. The San Antonio Transit System, as it was called, was operated pursuant to the terms of a private revenue bondholders' indenture with a local bank. In 1978, the system's facilities and equipment were transferred to SAMTA, doing business under the name VIA Metropolitan Transit. SAMTA is a political subdivision of the State of Texas, created pursuant to Article 1118x of Vernon's Annotated Texas Statutes. It came into existence in 1977 by virtue of actions taken by the City Council of San Antonio, which were confirmed in a general election held in November, 1977. That same election authorized SAMTA to collect a one-half percent (½%) sales tax. See Affidavit of Wayne M. Cook, paragraph 2 (filed April 30, 1980); Defendant-Intervenor Garcia's Memorandum in Response to Remand (filed November 15, 1982).

1067 (1938); Pub. L. No. 87-30 §§ 2(c), 9, 75 Stat. 65, 66, 72 (1961). Public employers remained entirely exempt until 1966. Diminution of federal authority resulting from private to public conversions during this period would have been attributable to the statutory exemption and consistent with congressional intent.

The FLSA was amended again in 1966 and 1974, eventually subjecting public transit employers to the full range of the Act's wage and overtime pay provisions.[5] It is the combined effect of these amendments that is at issue in this case. Because of their recent vintage alone, they cannot be the basis for finding a long standing federal regulatory scheme that will be eroded by a grant of Tenth Amendment immunity. *But cf, Scholz* v. *City of LaCrosse*, No. 80-C-238, slip op. (W.D. Wisc., September 1, 1982) (FLSA is the traditional federal regulation that precludes Tenth Amendment immunity for ali public transit.)

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[5] The 1966 amendments extended the FLSA to states and their political subdivisions with respect to schools, hospitals, and "street, urban or interurban electric railway(s), or local trolley or motorbus carrier(s) . . . whose rates and services are subject to regulation by a State or local agency." Pub. L. No. 89-601, § 102, 80 Stat. 831 (1966). These amendments specifically exempted operators, drivers and conductors of such railways and carriers from the overtime provisions of the Act. *Id.* at § 206, 80 Stat. at 836. The constitutionality of these amendments was upheld with respect to schools and hospitals in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). The same provisions were later invalidated in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

The 1974 amendments eliminated completely the public employer exemption of the 1938 act and also repealed the overtime exemption for operational employees of transit services. Pub. L. No. 93-259, §§ 6, 21(b)(1), 88 Stat. 58, 68 (1974).

The National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* is another source of federal authority. It is a generally applicable federal statute that has governed labor relations for private transit companies since its enactment in 1935. The NLRA, like the FLSA prior to 1966, contains an exemption for state and local governments. Thus, any diminution of federal authority under the NLRA that results from a private to public conversion is attributable to this statutory exemption, not to the Tenth Amendment, and is consistent with congressional intent.

Similarly, the Urban Mass Transportation Act (UMTA), 49 U.S.C. § 1601 *et seq.* will not be eroded by Tenth Amendment immunity. UMTA is an exercise of the Spending Power, implementing federal interests by conditioning federal funding on *voluntary* compliance by states. *See,* discussion at III, A, *infra.* UMTA's labor relations provision, section 13(c), was not intended to impose federal regulation or displace state prerogatives in the field of transit labor relations. *Jackson Transit Authority* v. *Local Div. 1285, Amalgamated Transit Union,* —— U.S. ——, 102 S.Ct. 2202 (1982). Regardless of whether or not Tenth Amendment immunity is granted, states will still have to comply with federal standards if they want to continue receiving federal money.

The effect of federal anti-discrimination statutes will not be eroded by granting transit a Tenth Amendment immunity. *See, Pearce* v. *Wichita County,* 590 F.2d 128, 132 (5th Cir. 1979) (ability to discriminate is not a function essential to the separate and independent existence of the states). The Veterans' Reemployment Rights Act, 38 U.S.C.

§ 2021 *et. seq.* will not be eroded by granting transit Tenth Amendment immunity. *Peel*, 600 F.2d 1070.

Nor will the effect of several federal statutes affecting aspects of mass transit other than labor relations be eroded. Defendant cites the Occupational Safety and Health Act, the Employees Retirement Income Security Act and antitrust laws. Post-Hearing Memorandum on Federal Regulations of Transit (filed January 21, 1983). But, each of these statutes has either a statutory or judicial exemption for public employers that is the limitation on federal authority rather than the Tenth Amendment. 29 U.S.C. §§ 652(5), 1003(b)(1); *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982). The Clean Air Act will continue to apply. *Friends of the Earth* v. *Carey*, 552 F.2d 25 (2d Cir.), *cert. denied*, 434 U.S. 902 (1977). The federal income tax laws will continue to apply, and public transit employees, like firemen, police officers, nurses and even elected public officials will have to pay their federal income taxes.

Defendant and Defendant-Intervenor have not shown that the effectiveness of any federal statute other than the FLSA, the constitutionality of which is at issue, will be eroded by granting transit Tenth Amendment immunity. In the absence of any erosion of federal authority, nothing in *LIRR* precludes Tenth Amendment immunity for previously private functions converted to public ownership and operation. To the contrary, the rule announced in *LIRR* implicitly recognizes that some conversions—those that do not erode federal authority—will result in Tenth Amendment immunity. Many governmental functions of today have at some time in the past been private functions. To deny Tenth Amendment

immunity on the ground that in the past the private sector was heavily involved in providing transit services would impose precisely the "static historical view of state functions" that *LIRR* eschews. 102 S.Ct. at 1354.

III. Other Factors Indicating Danger to the States' Separate And Independent Existence

LIRR tells courts that tradition is an important consideration because it can reveal whether a government function is so intimately connected with the states that "federal regulation . . . would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its 'separate and independent existence.'" 102 S.Ct. 1355 (citation omitted). With that as the goal of a Tenth Amendment inquiry, a court should go beyond historical analysis and consider other factors that indicate a function is so closely associated with states that Tenth Amendment immunity is required.

A. Analogy

Analogy to the non-exclusive list of traditional state functions set out in *Usery* is one method of testing for Tenth Amendment immunity. *See, Fry* v. *United States*, 421 U.S. 542, 557-58 (1975) (Rehnquist, J. dissenting; proposes an analogy test); *Scholz*, slip op. at 5 (most productive analysis is by analogy to functions which have been found to be traditional).

Usery stated that fire prevention, police protection, sanitation, public health, and parks and recreation were among the "*numerous* line and support activities which are well within the area of traditional operations of state and local governments." 426 U.S. at 851 n.16 (emphasis added). By over-

ruling *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), the Court added to this list public schools and hospitals. The only state function specifically taken off the list is state operation of a commuter railroad.[6] *LIRR*, 102 S.Ct. at 1349.

The states themselves have given public transportation almost universal recognition as an essential state function, thus placing it on a par with the *Usery* functions. *See*, TEX. REV. CIV. STAT. ANN. art. 1118x, § 6(a) (Vernon 1982 Supp.)[7]

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[6] The Long Island Railroad and SAMTA perform identical functions, transporting commuter passenger to and from homes, work places, schools, and stores. If the railroad is not exempt, then, by analogy, the bus system should not be exempt. Under *LIRR*, however, bus systems must be distinguished from railroad lines on the basis of the absence of a history of federal regulation. See discussion at II, *supra*. For other distinctions between commuter railroads and commuter buses see the brief filed by the United States as an *amicus curiae* in *LIRR*. (attached as Exhibit A to SAMTA'S Reply to the Defendants' Memoranda on Remand (filed November 23, 1982)).

[7] For other state laws decreeing public mass transit to be an essential function of government and showing that the concept embodied in Article 1118x is not unique to Texas, *see Inman Park Restoration, Inc.* v. *Urban Mass Transportation Administration*, 414 F. Supp. 99, 104 (N.D. Ga. 1975), *aff'd*, 576 F.2d 573 (5th Cir. 1978) (quoting an amendment to the state constitution providing that the public transportation of passengers for hire within a metropolitan area is an "essential governmental function"); *Henderson* v. *Metropolitan Atlanta Rapid Transit Authority*, 225 S.E.2d 424, 427 (Ga. 1976) (quoting a Georgia statute providing that MARTA is performing "an essential governmental function"); *Mass Transit Administration* v. *Baltimore County Revenue Authority*, 298 A.2d 413, 415 (Md. Ct. App. 1973); (quoting a Maryland statute that the Metropolitan Transit Authority is "performing an essential governmental function"); *Teamsters*

It is also evident from Congressional debate on public transportation legislation that Congress recognized the similarities between public transit and the *Usery* functions. *See, Metropolitan Mass Transportation Legislation: Hearings Before Subcomm. No. 1 of the House Comm. on Banking and Currency*, 86th Cong., 2d Sess. 14, 26 (1960) ("it is as necessary to provide transportation for these new communities as it is to provide other public necessities such as water, sewers, police and fire protection and so forth" [statement of Rep. Addonizio] . . . "it is a vital public necessity that such service be provided, as necessary to economic life of the community as the provision of water, police and fire protection and other recognized public necessities [statement of Rep. Corbett]); 120 Cong. Rec. 1042 (1974) ("mass transit is as much an essential public service as the fire department or hospitals" [statement of Sen. Biden]); 119 Cong. Rec. 4243 (1973) ("Mass transit is as much a public necessity as sanitation, police protection and education and can have the same overall community benefits." [statement of Sen. Hart]).

Moreover, it is extremely difficult to articulate an adequate basis upon which to distinguish public transit from the *Usery* functions. *Kramer* v. *New Castle Area Transit Authority*, 677 F.2d 308 (3rd Cir. 1982), *cert. denied*, —— U.S. ——, 51 U.S.L.W. 3527 (January 17, 1983) is a case that presents pre-

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Local Union No. 676 v. *Port Authority Transit Corp.*, 261 A.2d 713, 716 (N.J. Sup. 1970) (same—New Jersey statute); *County of Niagara* v. *Levitt*, 411 N.Y.S.2d 810, 812 (Sup. N.Y. 1978) (same—New York statute); *Pennsylvania* v. *Erie Metropolitan Transit Authority*, 281 A.2d 882, 885 (Pa. 1971) (same—Pennsylvania statute).

cisely the question presented by this case. It distinguished public transit on the basis of the large amount of federal funding made available pursuant to UMTA and denied Tenth Amendment immunity to a public transit authority. The level of federal funding is an unsatisfactory distinction for three reasons.

First, UMTA is an exercise of the Congressional Spending Power granted in Article I, Section 8, Clause 1 of the Constitution. *Voluntary* cooperation by a state with federal regulations enacted as a condition for the receipt of federal funds does not have the same negative implications for state sovereignty as does the unavoidable *imposition* of a federal scheme. Even the Court in *Usery* stopped short of finding that exercises of the Spending Power intruded on states' Tenth Amendment rights. 426 U.S. at 852 n.17. UMTA establishes a system of "cooperative federalism" that resembles a number of other statutes that lack Tenth Amendment implications. *Hodel*, 101 S.Ct. at 2366. If a state does not wish to receive federal transit funds, there can be no suggestion that the federal government is imposing a federal regulatory program that displaces state decisions. *See, United States* v. *Ohio Department of Highway Safety*, 635 F.2d 1195, 1205 (6th Cir. 1980), *cert. denied*, 451 U.S. 949 (1981) (federal scheme seeking to enforce state cooperation not a Tenth Amendment violation if state remains free to make essential decisions).

Second, federal funding supports each of the *Usery* functions.[8] At the time *Usery* was decided, the

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[8] Some of the federal statutes authorizing financial support for state functions exempted in *Usery* are as follows:

federal budget called for expenditures of $716 million for law enforcement. 426 U.S. at 878 (Brennan, J., dissenting). During fiscal 1979, the Department of Education alone provided state and local governments with $5.995 billion for education. Special Analysis, Budget of the United States Government Fiscal Year 1981 (Office of Management and Budget), pp. 267-68, table H-11. During 1979, the federal government likewise made grants to state and local governments of $3.756 billion for sewage treatment plant construction, *id.* at 265; $14.377 billion for health, *id.* at 269; and $517 million for the administration of justice, *id.* at 270.

Transit survives on a mix of funding indistinguishable from that relied upon by many of the *Usery* functions. Transit, sanitation, hospitals, higher education and parks all combine operating

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Police: Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3701, *et seq.*; Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. § 5601, *et seq.*

Fire: Federal Fire Prevention and Control Act of 1974, 15 U.S.C. § 2201, *et seq.*

Education: Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.*

Public Health/Hospitals: Public Health Service Act, 42 U.S.C. § 201, *et seq.* (as amended by the Health Planning and Resources Development Amendments of 1979); Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6001, *et seq.*

Parks and Recreation: Urban Park and Recreation Recovery Act of 1978, 16 U.S.C. § 2501, *et seq.*; Housing and Community Development Act of 1974, 42 U.S.C. § 5301, *et seq.*

Sanitation: Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*; Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301, *et seq.*; Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*

revenues such as fares, user fees, tuition and admission fees with state and local tax revenues and federal subsidies. Institute of Public Administration, Financing Transit: Alternatives for Local Government, Table 10-2 at 228 (July 1979) (attached as Exhibit A to Brief for SAMTA in Opposition to Defendants' Motion to Strike and for Extension of Time (filed August 7, 1980); hereinafter Financing Transit); Affidavit of Wayne M. Cook, paragraph 6 (filed April 3, 1980).

Third, the recent dramatic shifts in federal priorities show that federal funding is a particularly inappropriate test for a state's Tenth Amendment immunity. Federal funding is responsive to changing political demands. Funding levels reveal what the federal government considers its interest to be at any one point in time, but they do not adequately measure a state's sovereign interest.

Importance of a function to a state's citizens is, like federal funding, an inadequate basis for distinguishing public transportation from the *Usery* functions. Certainly, public transit is at least as important as parks and recreation and has as great a community-wide impact as hospitals.

Pervasiveness of government performance of a function is another inadequate distinction. It is true that not all cities and states provide public transit services. Defendant's Memorandum in Response to the Supreme Court Remand at 9-15 (filed November 3, 1982). But, in urban areas, where mass transit is a necessary service, there is pervasive government performance. In 230 of the 279 urban areas identified by the Department of Transportation (DOT), government provides transit services. SAMTA's Reply to the Defendants' Memoranda on Remand at

11 (filed November 23, 1982) (hereinafter SAMTA's Reply). When mass transit service is provided, it is government that provides it over 90 percent of the time. *Kramer*, 677 F.2d at 309. This is a more pervasive government involvement than is present in hospitals, an exempt function under *Usery*. Only 177 of the 279 urbanized areas identified by DOT have hospitals operated by state or local government. SAMTA's Reply at 12.

A function's origins in the private sector is another inadequate basis for distinguishing transit from the exempt *Usery* functions. *LIRR's* admonition against imposing a static historical view of governmental functions means that private sector origins do not legally preclude Tenth Amendment immunity. Hospitals, for example, had private sector origins. *Id.* at 17. Even though the Supreme Court now considers hospitals to have been fully transformed into a traditional and sovereign state function, private sector involvement remains significant. The private sector provides approximately half the hospital services in the United States. *Id;* SAMTA's Memorandum in Response to the Remand at 12 n.5 (filed July 15, 1982).

If transit is to be distinguished from the exempt *Usery* functions it will have to be by identifying a traditional state function in the same way pornography is sometimes identified: someone knows it when they see it, but they can't describe it.

B. The *Amersbach* Test

Another method of testing for Tenth Amendment immunity is to evaluate the four factors set out in *Amersbach* v. *City of Cleveland, supra*: (1) does the function benefit the community as a whole and is it made available at little or no direct expense; (2) is

the function undertaken for public service rather than pecuniary gain; (3) is government particularly well suited to perform the function because of a community-wide need; and (4) is government the principal provider of the function? 598 F.2d at 1037. When applied to mass transit, these factors indicate that Tenth Amendment immunity is appropriate.

Public transit benefits the community as a whole, helping to eliminate air pollution, alleviate traffic congestion, conserve energy, and stimulate economic development. *See*, policy statements in the Urban Mass Transportation Act, 49 U.S.C. §§ 1601, 1601a, and the National Mass Transportation Assistance Act of 1974, 49 U.S.C. § 1601b; *see also* TEX. REV. CIV. STAT. ANN. art. 1118x, § 1 (Vernon 1982 Supp.). Moreover, public transit is provided at a heavily subsidized price. Fares are nominal and account for only about 25 percent of operating expenses. Affidavit of Wayne M. Cook, at paragraph 6 (filed April 30, 1980). While some of the fare subsidy is from federal funding, a larger portion is from tax revenues collected pursuant to Texas statute. *Id.* The decision by the State of Texas to grant regional transit authorities an independent tax base and the election by San Antonio area voters to impose such a tax on themselves is another indication that public transit benefits the community as a whole.

The reality of transit industry economics is that services cannot be provided at a profit. *See*, 49 U.S.C. § 1601b(3), (4). Even with federal funds available, state and local tax dollars remain the predominate source of support. *See*, Financing Transit at 36. This is a clear indication that government

provides transit for public service, not for pecuniary gain. These same facts indicate that government is particularly well suited to provide transit services. In the absence of a profit motive to attract private enterprise, government is the only component of society that can provide the service.

Finally, government is today the primary provider of transit services. When the total number of transit operations in the United States are counted without respect to size, state and local governments owns and operates only about half the service. But, this is a misleading figure because state and local government provides the overwhelming majority of transit services. By 1978, public transit accounted for 91 percent of total vehicle miles, 91 percent of linked passenger trips, 90 percent of revenues generated, and 87 percent of transit vehicles operated. *Kramer*, 677 F.2d at 309.

IV. Conclusion

The import of *LIRR* is two-fold. First, Tenth Amendment claims must be supported by a showing, based on historical reality or other factors, that when a line between state and federal prerogatives must be drawn, performance of the function at issue falls so clearly on the states' side of the line that imposition of federal authority would undermine the role of the states in our federal system. History indicates that transit falls on the states' side of the line. So do analogy to the *Usery* functions and applications of the *Amersbach* test.

Second, *LIRR* announces a limitation on Tenth Amendment immunity. Notwithstanding indications from history or other factors, states and their political subdivisions may not erode existing federal au-

thority by assuming ownership and operation responsibilities for functions previously performed by the private sector. No such federal authority exists to be eroded in the area of transit. The FLSA provisions challenged here are recent departures from an earlier policy in which Congress recognized states' interest in wage and hour regulation by exempting states. Even the federal regulation that deals most comprehensively with transit, UMTA, declined to impose federal authority, opting instead for a system of voluntary cooperation that recognizes the states' predominate interest in transit.

This Court finds that the imposition of FLSA wage and overtime pay provisions on state transit workers would undermine the states' role as surely as would the imposition of the same provisions on state employees performing police, fire, sanitation services. It is, therefore, ORDERED that Summary Judgment be, and hereby is, reentered in favor of Plaintiff and Plaintiff-Intervenor, and Defendant's and Defendant's-Intervenor's Motions for Partial Summary Judgment be, and hereby are DENIED.

Signed this 18 day of February, 1983.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,
PLAINTIFF-INTERVENOR

vs.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY OF LABOR OF THE UNITED STATES,
DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

[Filed Feb. 18, 1983]

ORDER WITHDRAWING MEMORANDUM OPINION AND JUDGMENT

The Memorandum Opinion and Judgment entered by the Court on February 14, 1983 are hereby withdrawn, and the Amended Memorandum Opinion and Amended Judgment attached to this Order are substituted in their place. The Amended Memorandum Opinion and the Amended Judgment shall both be effective as of February 14, 1983.

Signed this 18th day of February, 1983.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA 79 CA 457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,
PLAINTIFF-INTERVENOR

v.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY OF LABOR OF THE UNITED STATES,
DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

JUDGMENT

This cause was heard by this Court on September 10, 1981, upon motions for summary judgment filed by San Antonio Metropolitan Transit Authority and American Public Transit Association and motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia. The Court has carefully considered the motions, briefs, affidavits and other material on file in this cause and the arguments of counsel and finds that there is no genuine issue as to any material fact in this cause and that the Plaintiff and Plaintiff-Intervenor are entitled to a judgment as a matter of law. The Court accordingly *finds that*

the motions of San Antonio Metropolitan Transit Authority and American Public Transit Association for summary judgment should be granted and that the motions for partial summary judgment of the Secretary of Labor and Joe G. Garcia should be denied.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED:

1. That the motions for summary judgment of Plaintiff San Antonio Metropolitan Transit Authority and Plaintiff-Intervenor American Public Transit Association are hereby granted;

2. That local public mass transit systems (including San Antonio Metropolitan Transit Authority) constitute integral operations in areas of traditional governmental functions under the decision of the United States Supreme Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) and that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, against local public mass transit systems in the United States, including San Antonio Metropolitan Transit Authority;

3. That the "Final Interpretation" issued by the Wage and Hour Division of the United States Department of Labor on December 21, 1979 (44 Federal Register 75628-75630) is null and void insofar as it lists local public mass transit systems as not being integral operations in areas of traditional governmental functions under *National League of Cities* v. *Usery*, *supra*;

4. That the motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia are hereby denied;

5. That the counterclaim filed by the Secretary of Labor on February 8, 1980 is hereby dismissed with prejudice; and

6. That the Defendant Secretary of Labor and Defendant-Intervenor Joe G. Garcia pay all costs incurred in this action by Plaintiff and Plaintiff-Intervenor.

SIGNED this 17 day of November, 1981.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. SA-79-CA-457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,
PLAINTIFF-INTERVENOR

vs.

THE HONORABLE RAYMOND J. DONOVAN,
SECRETARY OF LABOR OF THE UNITED STATES,
DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

JUDGMENT

Pursuant to the order of the United States Supreme Court remanding this case for further consideration, this Court has reviewed its order of November 17, 1981. Upon careful reconsideration of the motions for summary judgment filed by San Antonio Metropolitan Transit Authority and American Public Transit Association, the motions for partial summary judgment filed by the Secretay of Labor and Joe G. Garcia, and briefs, affidavits and other materials filed in sup-

port of these motions and in response to the remand, the Court concludes that there is no genuine issue as to any material facts in this cause and that the Plaintiff and Plaintiff-Intervenor are entitled to judgment as a matter of law. Therefore, the motions of San Antonio Metropolitan Transit Authority and American Public Transit Association for summary judgment shall be GRANTED, and the motions for partial summary judgment by the Secretary of Labor and Joe G. Garcia shall be DENIED.

It is, therefore, ORDERED, ADJUDGED and DECREED:

1. That the motions for summary judgment of Plaintiff San Antonio Metropolitan Transit Authority and Plaintiff-Intervenor American Public Transit Association are hereby GRANTED;

2. That mass transit is an area of traditional governmental function under the decisions of the United States Supreme Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) and *United Transportation Union* v. *Long Island Railroad Company*, —— U.S. ——, 102 S.Ct. 1349 (1982), and that the adoption and implementation of wage and overtime pay policies is an integral operation in this area such that the Secretary of Labor of the United States cannot apply or seek to enforce the minimum wage and overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* against publicly owned and operated mass transit systems in the United States, including San Antonio Metropolitan Transit Authority.

3. That the "Final Interpretation" issued by the Wage and Hour Division of the United States Department of Labor on December 21, 1979 (44 Federal Register 75628-75630) is null and void insofar

as it lists local public mass transit systems as not being integral operations in areas of traditional governmental functions;

4. That the motions for partial summary judgment filed by the Secretary of Labor and Joe G. Garcia are hereby DENIED.

5. That the counterclaim filed by the Secretary of Labor on February 8, 1980 is hereby DISMISSED with prejudice; and

6. That the Defendant Secretary of Labor and Defendant-Intervenor Joe G. Garcia pay all costs incurred in this action by Plaintiff and Plaintiff-Intervenor.

Signed this 18 day of February, 1983.

/s/ Fred Shannon
FRED SHANNON
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil Action No. 79 CA 457

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,
PLAINTIFF

and

AMERICAN PUBLIC TRANSIT ASSOCIATION,
PLAINTIFF-INTERVENOR

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR
OF THE UNITED STATES, DEFENDANT

and

JOE G. GARCIA, DEFENDANT-INTERVENOR

Filed Mar. 3, 1983

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Pursuant to 28 U.S.C. § 1252 and 2101(a), the Secretary of Labor hereby appeals to the Supreme Court of the United States from the amended Judgment of this Court in the above-captioned action entered on February 18, 1983 and effective as of February 14, 1983.

DATED: March 2, 1983

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

EDWARD C. PRADO
United States Attorney

/s/ Dennis G. Linder
DENNIS G. LINDER

/s/ Mark C. Rutzick
MARK C. RUTZICK

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APPENDIX F

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. V) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. V) 203:

> As used in this chapter—
>
> * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the actvities of a public agency,

shall be deemed to be activities performed for a business purpose.

* * * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees

engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

* * * * *

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(5) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. (Supp. V) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the produc-

tion of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

3. The Urban Mass Transportation Act of 1964, 49 U.S.C. (& Supp. V) 1601 *et seq.*, provides in pertinent part:

49 U.S.C. 1601:

(a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and

other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated mass transportation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass

transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

49 U.S.C. (Supp. V) 1603(a):

* * * The Federal grant for any such project to be assisted under Section 1602 of this title shall be in an amount equal to 80 per centum of the net project cost. * * *

49 U.S.C. 1604(e):

The Federal grant for any construction project under this section shall not exceed 80 per centum of the cost of the construction project, as determined under section 1603(a) of this title. The Federal grant for any project for the payment of subsidies for operating expenses shall not exceed 50 per centum of the cost of such operating expense project. * * *

49 U.S.C. 1609(c):

It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and bene-

fits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

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